ESTTA Tracking number: **ESTTA1045993**

Filing date: **03/31/2020**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91249427
Party	Plaintiff Evolutionary Guidance Media R&D Inc.
Correspondence Address	MEREDITH LOWRY WRIGHT LINDSEY & JENNINGS LLP 3333 PINNACLE HILLS PARKWAY SUITE 510 ROGERS, AR 72758 UNITED STATES mlowry@wlj.com, bcole@wlj.com, aelliott@wlj.com 4796313282
Submission	Opposition/Response to Motion
Filer's Name	Meredith Lowry
Filer's email	mlowry@wlj.com, aelliott@wlj.com
Signature	/Meredith Lowry/
Date	03/31/2020
Attachments	Response_to_Motion.pdf(446279 bytes)

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVOLUTIONARY GUIDANCE MEDIA R&D INC.,	)	
Opposer,	)	**Opposition No. 91249427**
	)	**88219305**
v.	)	
CYBERMAN SECURITY, LLC AKA THE CYBERHERO ADVENTURES: DEFENDERS OF THE DIGITAL UNIVERSE	)	**Mark: THE CYBERHERO ADVENTURES: DEFENDERS OF THE DIGITAL UNIVERSE**
	)	**Published: May 14, 2019**
Applicant	)	

OPPOSER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO EXTEND DISCOVERY PERIOD

Opposer Evolutionary Guidance Media R&D Inc. ("Opposer") hereby objects and responds to Applicant Cyberman Security, LLC aka The Cyberhero Adventures: Defenders of the Digital Universe ("Applicant") motion to extend time for discovery.

As noted by Applicant, the discovery period closed on March 17, 2020. Applicant's motion is more accurately a motion to reopen discovery as opposed to a motion to extend time, both having differing burdens for the movant. *See Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 n.10 (TTAB 2011). Opposer, however, believes that Applicant does not satisfy either standard, and addresses each in opposition to the motion by Applicant.

Applicant asks that the Board extend the discovery period in light of its delay in filing untimely discovery requests, leaving Applicant less than a month prior to the end of the discovery period to respond. *See* TBMP §403.03; *See also* MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES OF PRACTICE, 81 Fed. Reg. 69950, 69951 (October 7, 2016) ("[D]iscovery must be served early enough in the discovery period that responses will be provided and all discovery complete by the close of discovery."). Applicant's delay in serving discovery requests is not good cause for an extension of the discovery period. *See National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854-55 (TTAB 2008) (party's motion to extend discovery period denied where the party did not serve written discovery requests until late in the discovery period and evidence does not support the party's claim that they delayed discovery because parties were engaged in settlement discussions); *Dating DNA, LLC v. Imagini Holdings, Ltd.*, 94 USPQ2d 1889, 1892 n.3 (TTAB 2010) ("a party that delays in initiating discovery . . . generally is not entitled to an extension to allow for follow-up discovery"); *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 (TTAB 1987) (no reason given why discovery was not taken during the time allowed).

Applicant has alleged in its motion that it requested a stipulation to extend discovery. This is not so. Applicant did propose a settlement position by phone on March 16th and Opposer's counsel indicated it would still provide objections to discovery while the parties were negotiating. Opposer served its objections on March

18th for all requests and Applicant requested that Opposer grant an extension of time on March 23rd, as evidenced in the attached email from Applicant's counsel.

A party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time allotted. *National Football League*, 85 USPQ2d at 1854. Applicant argues that its delay was caused by recent attempts to settle this matter. This also is not so. Applicant has recently reached out to Opposer to discuss settlement, as evidenced in Exhibit A. These settlement discussions were not initiated until March 16th, almost a month after Applicant served its discovery requests. Any delay by Applicant in February was not a result of its March actions. Applicant cannot show that it did not unreasonably delay in sending its discovery requests and therefore Opposer requests that the Board deny Applicant's motion.

A party moving to reopen discovery or any time period which has expired must show that its failure to act timely during period was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B). Applicant has not met this burden.

In determining whether a party has shown excusable neglect, the courts and the Board take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), *Pumpkin Ltd. v. The Seed Corps*, 43

USPQ2d 1582 (TTAB 1997). As noted in TMBP § 509.01(b)(1), the reason for the delay may be deemed the most important factor. *See FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc*., 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007) (Finding of no excusable neglect with third weighed heavily in the analysis); *Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012).

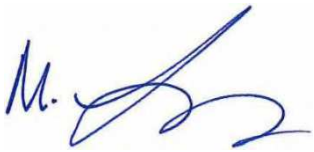
Applicant had the ability and means to serve timely discovery requests at any point during the discovery period and has not provided evidence or rationale on why it waited until almost the end of discovery. The delay by Applicant was of its own making and no excusable under the precedent set by the Board in cases such as *Luster Products Inc. v. Van Zandt.* In *Luster*, Van Zandt allowed the discovery period to lapse without timely sending discovery requests and then later requested the discovery period to be reopened. The Board found that the "delay caused by applicant's failure to act prior to the close of the discovery period is significant." *Id*.

Applicant finally requests relief in light of the COVID pandemic. While we recognize the global and societal change this virus has caused and the heartbreaking loss of thousands of lives, the mid-February delayed timing of service of Applicant's discovery requests was not a result of the pandemic that began March 1, 2020 in New York City.

Opposer respectfully requests that the Board deny Applicant's Motion to Extend the Discovery period.

Respectfully submitted,

WRIGHT LINDSEY & JENNINGS LLP



Meredith K. Lowry, AR Bar 2005232
3333 Pinnacle Hills Pkwy. Ste. 510
Rogers, AR 72758
(479) 631-3282
Attorneys for Applicant

Date: 3/31/2020

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, copies of this paper are being served via email addressed to the following:

MAXIM H. WALDBAUM
gary@cybermansecurity.org, maxim.waldbaum@rimonlaw.com, tad.prizant@rimonlaw.com

/Meredith K. Lowry/
Meredith K. Lowry, AR Bar 2005232
WRIGHT LINDSEY & JENNINGS LLP
3333 Pinnacle Hills Pkwy. Ste. 510
Rogers, AR 72758
(479) 631-3282
Attorneys for Applicant

Exhibit A

Meredith Lowry

From: Maxim Waldbaum <maxim.waldbaum@rimonlaw.com>
Sent: Monday, March 23, 2020 5:34 PM
To: Meredith Lowry
Cc: Tad Prizant; Joseph Rosenbaum
Subject: <EXTERNAL>Re: EGM v. Cyberman Stipulation/Motion to extend discovery for two weeks

Hi Meredith
We suggested a settlement proposal for this case on March 16. Discovery closed on March 17. We received your responses to discovery last week that refuses to answer most of the requests by reason of the closure date.

Please consider a stipulation to extend discovery by two weeks Munchen pro tunc to allow you to fully respond. If I do not hear from you in the next few days we will move the TTAB to request such modest extension. Please let me have your response on settlement or your discovery responses as soon as possible. Thank you,mac

Maxim H. Waldbaum
Partner
RIMON P.C.
245 Park Avenue
New York,New York 10167
maxim.waldbaum@rimonlaw.com
Tel: 917-603-3905

Sent from my iPhone

> On Mar 18, 2020, at 15:51, Meredith Lowry <MLowry@wlj.com> wrote:
>
> Maxim,
>
> I've sent your client's proposal to my client and I'm awaiting a response.
>
> Given that discovery has ended, I have attached our responses that are due later this week to preserve our position while we negotiate settlement terms.
>
> WRIGHT LINDSEY JENNINGS
> Meredith Lowry
> ATTORNEY
> 479.631.3282 | MLowry@wlj.com
>
> Wright, Lindsey & Jennings LLP
> 3333 Pinnacle Hills Parkway, Suite 510 | Rogers, AR 72758
> Main 479.986.0888 | Fax 479.986.8932 | wlj.com
>
> <Responses_Rogs.pdf>
> <Responses_to_RFP.pdf>
> <Response_to_RFA.pdf>